FILED COPY

No. 72-1690

FILED

SEP 10 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

v.

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

CHRISTOPHER T. BAYLEY
King County Prosecuting Attorney

King County Courthouse
Seattle, Washington 98104

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that the constitutional question sought to be reviewed is so unsubstantial as to not need further argument.

I
THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the constitutionality of Revised Code of Washington 9.86.020.

This statute provides that no person shall for exhibition or display place "any word, figure, mark, picture, figure, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield" of the United States or the State of Washington or publically expose "any such flag, standard, color, ensign or shield" upon which "such word, figure, mark, picture, design, drawing or advertisement" appears. RCW 9.86.020.

B. The Proceedings Below

On May 10, 1970, the Appellant displayed an American flag outside his apartment window in Seattle upon which he had attached a "peace symbol." The flag, bearing this marking, was seen by three Seattle police officers who arrested the Appellant. Appellant was charged and subsequently convicted of violating RCW 9.86.020 in the Seattle District Court. He was again convicted in the Superior Court of the State of Washington for King County, in a trial de novo.

Appellant appealed his conviction to the Court of Appeals of the State of Washington contending that (1) RCW 9.86.020 violates the First Amendment to the United States Constitution and Article I, Section 5 of the Washington State Constitution and that (2) the statute is unconstitutionally vague and overbroad. That court reversed the trial court (2-1), holding that the challenged statute is unconstitutionally overbroad. *State v. Spence*, 5 Wn. App. 752, 490 P.2d 1321 (1971). The State of Washington appealed to the Washington Supreme Court. In an en banc decision, the Supreme Court reversed the decision of the Court of Appeals and remanded the case for reinstatement of the judgment and sentence, thereby upholding the constitutionality of RCW 9.86.020. *State v. Spence*, 81 Wn.2d 788, 506 P.2d 293 (1973).

II

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

Appellant contends that RCW 9.86.020 substantially curtails his First Amendment rights of free speech and political expression. To publically display an American flag to which one has affixed a peace symbol cannot be deemed traditional speech. Rather, Appellant contends that his action constitutes symbolic speech for he allegedly displayed the altered flag to protest United States involvement in Southeast Asia.

This Court recognized in *United States v. O'Brien*, 391 U.S. 367, **20 L. Ed. 2d 672**, (1968), 88 S. Ct. 1673, that merely because one intends his action as a political protest does not mean that the action becomes constitutionally protected symbolic speech. This Court said at page 376:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . .

Assuming Spence's action can be deemed symbolic speech, a constitutional balance must be applied to determine whether the activity merits protection. In this case the state's historical interest in preserving the sanctity of the flag and preventing public disorder must be weighed against any resulting infringement to Spence's rights. The Court articulated this test in *O'Brien, supra.*, at 376-377:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . .
>
> . . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . .

Applying the *O'Brien* standards to the present case, the display of an American flag bearing a peace symbol is not constitutionally protected symbolic speech. First, this Court decided in

Halter v. Nebraska, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907) that a state possesses the constitutional power to prevent the misuse of the American flag. Second, CW 9.86.020 furthers an important governmental interest by preventing breaches of the peace which might be generated through misuse, and by safeguarding our national emblem from exploitation, *Halter v. Nebraska, supra., Joyce v. United States*, 454 F.2d 971 (1971, at App. D.C.); and *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970) aff'd by an equally divided court, 400 U.S. 864, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971). Third, this governmental interest in protecting the physical integrity of the flag, is unrelated to the suppression of free expression or political protest.

Most importantly, any incidental restriction on the alleged First Amendment freedoms is no greater than is essential to protect and safeguard the flag. RCW 9.86.020 did not drastically restrict Appellant's right to protest the Cambodian incursion; innumerable other lawful means of expression remained available.

Appellant finally contends that RCW 9.86.020 poses additional dangers to First Amendment rights by proscribing various uses of the flag without making intent to misuse an element of the crime. This

argument assumes that the challenged statute regulates speech or communication; instead, it advances the state's legitimate interest in protecting the flag by defining action which is *mala prohibita*. As such, the intent of one misusing the flag is irrelevant.

In his jurisdictional statement (p. 7, fn. 3) Appellant suggests that this case could be conveniently joined with *Goguen v. Smith*, 471 F.2d 88 (1st Cir. 1972), prob. juris. noted, 41 U.S. Law Week 3616 (No. 72-1254 March 21, 1973) and *Long Island Vietnam Moratorium Committee v. Cahn*, 437 F.2d 344 (2nd Cir. 1970) jur. statement filed, 39 U.S. Law Week 3438 (No. 70-1507, March 24, 1971).

In *Goguen*, the Court of Appeals reversed a conviction under a Massachusetts flag desecration statute prohibiting contemptuous treatment of the flag. The Court held that the Massachusetts statute is impermissibly vague because what one man intends as political expression may be construed by another as contemptuous treatment of the flag. Obviously such a consideration raises fundamental First Amendment questions. RCW 9.86.020, on the other hand, requires only a determination of whether any "word, figure, mark ..." was placed upon a flag of the United States or the State of Washington. Such an inquiry does not raise

the threshold First Amendment questions posed by the Massachusetts statute. The statutes are thus clearly distinguishable and the cases ill suited for joinder.

Appellant concedes that the present case more closely resembles *Long Island, supra*, which challenges a New York State flag "use" statute similar to RCW 9.86.020. Appellant's brief, however, fails to indicate that this Court denied certiorari in *Long Island Vietnam Moratorium Committee v. Cahn*, cert. denied, 400 U.S. 956, 91, 27 L. Ed. 2d 264, 91 S. Ct. 353 (1970), despite the fact that *Long Island* posed the issue of constitutional overbreath more clearly than the present case. In *Long Island* defendants argued that the New York flag statute was overbroad because it failed to notify them that their flag representation was prohibited. In fact the three judge federal court and the Court of Appeals differed as to whether the Moratorium Committee's emblem fell within the purview of the flag misuse statute. In *Spence* there can be no doubt that RCW 9.86.020 prohibits attaching any symbol to he flag of the United States.

III

CONCLUSION

Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal, or in the alternative to affirm the judgment entered in the cause by the Supreme Court of the State of Washington.

Respectfully submitted,

CHRISTOPHER T. BAYLEY
Prosecuting Attorney
Counsel for Appellee